



# Commonwealth of Massachusetts State Ethics Commission

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## CONFLICT OF INTEREST OPINION EC-COI-87-24

### FACTS:

You are employed by state agency ABC. You have been requested by a member of the Board of BarExaminers to serve as a reader/grader of bar examinations of the applicants for admission to practice law in Massachusetts. Your employer, state agency ABC, does not regulate any activities of the Board of Bar Examiners. In your ABC capacity, you neither participate in nor have any official responsibility for the activities of the Board of Bar Examiners. The services that you have been requested to perform would be provided outside of the normal working hours of the Trial Court, are not required as part of your regular duties for the Trial Court, and would be completed in substantially less than 500 hours in any calendar year.

There is no public notice of the opportunity to serve as reader/grader of bar examinations. The process by which an attorney becomes a reader/grader is entirely by "word of mouth." There is no formal procedure or application process for the selection of reader/grader. The only qualification is that you be an attorney at law. As a matter of policy the Board of Bar Examiners will not hire a reader/grader who is also a state employee, so as not to cause any appearance of conflict, unless the potential reader/grader has a written opinion from the State Ethics Commission authorizing such employment.

### QUESTION:

Does G.L. c. 268A permit you to receive compensation for your service as a reader/grader of bar examinations?

### ANSWER:

No.

### DISCUSSION:

The Commission concludes that your receipt of compensation from the Board of Bar Examiners will give you a financial interest in a contract made by the Board, and that you do not qualify for an exemption permitting such an interest because the process of appointment is not sufficiently open to satisfy the public notice requirement. G.L. c. 268A, s.7(b).

A state employee may not have a direct or indirect financial interest in a contract made by a state agency in which the commonwealth or a state agency is an interested party, G.L. c. 268A, s.7, unless an exemption applies. The general rule is that, absent such an exemption, when a state employee is appointed by another state agency such as the Board of Bar Examiners, and performs services for that agency and receives compensation, the employee violates s.7. Prior to 1983, for all practical purposes, full-time state employees, like yourself, were prohibited by s.7 from financial interests in other state contracts. See, EC-COI-80- 117. In 1982, the General Court established an exemption, s.7(b), which allows in a limited way, certain full-time state employees to have a financial interest in state contracts. Several statutory conditions, which were designed as safeguards against potential insider influence, include a requirement that the contract be "made after public notice or where applicable, through competitive bidding."

The term "public notice" is not defined in the conflict of interest law. As the agency authorized to enforce and administer that law, the Ethics Commission possesses the authority to interpret it. *Grocery Manufacturers of America, Inc. v. Department of Public Health*, 379 Mass. 70,75(1979). Such an interpretation must keep in mind the "cardinal rule" that exemptions from general statutory provisions are to be strictly construed. *Department of Environmental Quality Engineering v. Town of Hingham*, 15 Mass. App. Ct. 409, 412 (1983). In this case, any such interpretation of "public notice" must also take into account the pairing of the term in the statute with "competitive bidding" and the stated purpose of the drafter that "the general public [have] equal access to the contract through notice ... "[1] Generally, s.7 is designed to eliminate the public impression that state employees have an "inside track" for the opportunity to compete for state jobs or contracts. Where applicable, the mechanics of the competitive bidding process are sufficient to meet that goal. Such competition is not appropriate in many personal service employment arrangements. Therefore, a process other than competitive bidding, but addressing the concerns satisfied by that mechanism, must be adopted. Both the public notice and the competitive bidding process must meet the goal of facilitating public access to state contracts which the s.7(b) exemption was intended to achieve.

The Commission has had occasion to define public notice in the context of specific factual situations. The Commission has been flexible in the kind of advertising necessary for a s.7(b) exemption; for example, by permitting advertising in trade or professional journals designed to be circulated to all eligible appointees within a geographic area. See, EC-COI-83-97. The Commission's policy of departing from a hard and fast requirement that advertising be in a newspaper of general circulation is based on the common-sense notion that targeted advertising in trade or professional journals is more likely to reach the field of potential eligible candidates than is an advertisement in a newspaper of general circulation. Similarly, the Commission has concluded that a "process based primarily on word-of-mouth between a state agency and potential eligible employees does not possess sufficient vestiges of openness to satisfy the public notice requirement. See, EC-COI-83-95. In EC-COI-85-7, the Governor was looking for a representative of the public on a seven member board.

The Governor did not publicize the current public member vacancy in a newspaper or other periodical of general circulation. The search was limited to a word-of-mouth request to three institutions seeking resumes from qualified women and minorities interested in health care issues. The Commission concluded that this was not "public notice" within the meaning of s.7(b). In the circumstances of this case, publication in a professional periodical such as the Massachusetts Lawyers Weekly would appear to be the minimum requirement to satisfy the public notice requirement of s.7(b).

The Commission will not waive the public notice requirement upon a theory that public advertising would be impractical or not effective. There is no language in s.7(b) which exempts public agencies from the public notice requirement for "good cause." If such an exemption were intended by the General Court, it could have so explicitly stated, See, e.g., Federal Administrative Procedures Act, s.553(b)(B), which explicitly permits deviation from public notice if "impractical." [2] It is not for the Commission to waive the public notice requirement or broaden its scope by interpretation. Any such change in law or policy must emanate from the General Court.

In conclusion, equal access to the opportunity to be appointed to serve as reader/grader for bar examinations has not been provided to the members of the Bar. The Commission cannot waive a requirement which is explicitly mandated by the General Court. Therefore, the Commission concludes that your situation is indistinguishable from EC-COI-85- 7 and that you may not be a paid reader/grader for Bar examinations under the present circumstances.

DATE AUTHORIZED: June 30, 1987

[1] Summary statement accompanying House 1235, p. 10(1982).

[2] This exemption from public notice requirements if "impractical" or for "good cause" is viewed narrowly by the courts and, indeed, it is not infrequent that an administrative agency's interpretation of circumstances under which public notice will be "impractical" will be overturned by a court of law. See, *Independent Brokers Realtors, Trade Associations v. F.E.C.*, 442 F. 2nd 132 (D.C. Cir. 1971).